



## MEMORANDUM

April 5, 2013

TO: Board of Appeals

FROM: *CSC*  
Cas Chasten, Planner III - CPDS  
Staff Liaison

SUBJECT: (Major Modification) Special Exception SPX2012-00385  
1235 Potomac Valley Road  
Potomac Valley Nursing Home & Wellness Center

The attached documents are provided for the Board's review and consideration. The referenced application is scheduled to be heard by the Board of Appeals on April 13, 2013.

By way of background, the application is a modification of the site's previously approved special exception applications SPX96-0245 and S-50-61. The modification application was initially filed with Community Planning & Development Services on February 17, 2012. Since the initial filing of this application, the applicant has scaled back the project, eliminating plans to construct a 13,984 square foot building addition, which was one of the elements of their plans to improve the site use and its operation.

Since the initial filing of this application, the applicant and their consultants have met with interested neighboring property owners and city staff to discuss the project. Over the course of the past year, the applicant has worked with staff and a number of neighboring property owners, to address concerns which were raised during the processing of this application request.

In late December 2012 the applicant amended their proposal for a third time, scaling back plans to expand and improve the building as originally proposed. Thus, this major amendment to the home's existing special exception will be limited to operational/staffing changes, site modifications to landscaping, installation of new site signage, stormwater management improvements, forest conservation, on-site vehicular parking, replacement of an emergency generator, and site storage.

However, please be advised that prior to the applicant's most recent project revisions, Mark Wetterhahn, a neighboring property owner submitted "motion to view properties related to the proposed expansion" several months ago, to be forwarded to the Board of

Board of Appeals  
Page 2  
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Appeals for its consideration. In response to Mr. Wetterhahn' request, the applicant submitted, via its legal counsel, a response to the Wetterhahn motion, also for the Board's consideration.

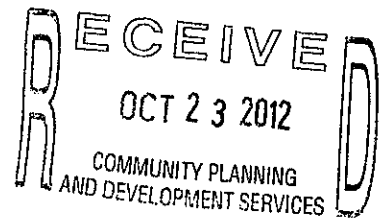
Thus, staff provides all such information submitted to date, which is forwarded for the Board's consideration, in preparation for the upcoming April 13, 2013 public hearing on this application request.

Should you have questions regarding this matter, please feel free to contact me at [cchasten@rockvillemd.gov](mailto:cchasten@rockvillemd.gov). Your attention in this matter is appreciated.

/cdc  
Attachments

cc: Bobby Ray, Principal Planner  
Cynthia Walters, Senior Assistant City Attorney  
Jim Wasilak, Chief of Planning

BEFORE THE ROCKVILLE BOARD OF APPEALS



**IN RE: SPECIAL EXCEPTION APPLICATION SPX2012-000385**  
**AMENDMENT TO SPX 1996-00245 SNF S-50-61**  
**POTOMAC VALLEY NURSING FACILITIES, INC., Applicant**  
**1235 Potomac Valley Road, Rockville, Maryland**

**Petition to Intervene and Become Parties of Record in the**  
**Proceeding Related to the Proposed Expansion of**  
**The Potomac Valley Nursing and Wellness Center**

**Introduction**

This petition is being filed before the City of Rockville Board of Appeals (hereinafter "Board") on behalf of an *ad hoc* group of residents of the communities surrounding the Potomac Valley Nursing and Wellness Center (hereinafter "Nursing Home" or "Applicant") in opposition to the issuance of an amendment to a special exception which would permit the construction and operation of an almost 10,000 square foot addition to the Nursing Home in close proximity to homes located on Don Mills Court. The proposed addition would have significant impact on these homes, on the residences along the entire length of Potomac Valley Road, the many residents of the Markwood and New Mark Commons communities and as well as the residents of the Nursing Home (collectively the "Communities").

For purposes of formally establishing interest and the identification of specific parties to participate in the subject proceeding, this petition is being filed on behalf of Ann M. and Martin L. Reiss, residents and owners of 9 Don Mills Court, Rockville Maryland 20850, contiguous to the Nursing Home property and closest to the proposed addition. They will be

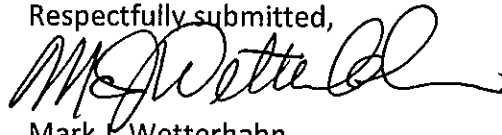
significantly and adversely affected by the approval of the special exception. They allege that the scale and height of the structure are inappropriate considering the proposed location close to their home and the difference in elevation of the properties. Noise and other construction impacts will affect their use and enjoyment of their home. Ingress and egress from the property via Potomac Valley Road, one of only two means of entering and leaving the New Mark Commons community, will be affected over an extended period. Impacts of operation, including noise and the discharge of stormwater from the Nursing Home, will specifically and inordinately affect them. They are both retired and their health and welfare will be affected by both the construction and operation of the proposed addition. They would be denied constructive use and enjoyment of their home were the Nursing Home addition to be approved.

Mark and Marilyn Wetterhahn are also residents of Don Mills Court (No. 2) and will be similarly affected by the addition. These individuals have attended every meeting with representatives of the Nursing Home and most, if not all, meetings with the Staff of the City of Rockville since the public announcement of the proposed project and such participation has informed the City Staff in its review.

Mark Wetterhahn is appearing as agent for the petitioners and his notice of appearance is filed separately. Based upon the foregoing, it is moved that the identified individuals become

Parties of Record. To the extent that additional support or an affidavit is necessary to participate in this matter and file testimony, leave is requested to make such a filing.

Respectfully submitted,

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Mark J. Wetterhahn  
Agent for Petitioners

**BEFORE THE ROCKVILLE BOARD OF APPEALS**

**IN RE: SPECIAL EXCEPTION APPLICATION SPX2012-000385**

**AMENDMENT TO SPX 1996-00245 SNF S-50-61**

**POTOMAC VALLEY NURSING FACILITIES INC., Applicant**

**1235 Potomac Valley Road, Rockville, Maryland**

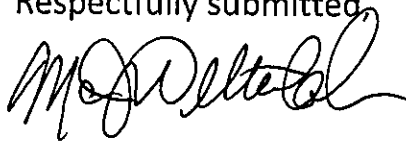
**Notice of Appearance of Mark J. Wetterhahn on behalf of  
Martin L. Reiss, P.E., Ann M. Reiss, et al., in the Captioned Matter**

I, Mark J. Wetterhahn, notice my appearance as agent in the captioned matter on behalf of Martin L. Reiss, Ann M. Reiss, and Marilyn J. Wetterhahn. I am also appearing *pro se*. Service for these petitioners, if admitted as parties, should be made upon:

Mark J. Wetterhahn  
2 Don Mills Court  
Rockville MD 20850-2745

Representation of other parties may be added prior to or at the hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark J. Wetterhahn', written in a cursive style.

Mark J. Wetterhahn

**BEFORE THE ROCKVILLE BOARD OF APPEALS**

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AMENDMENT TO SPX 1996-00245 SNF S-50-61  
POTOMAC VALLEY NURSING FACILITIES< INC., Applicant  
1235 Potomac Valley Road, Rockville**

**Motion to View Properties Related to the Proposed Expansion of  
The Potomac Valley Nursing and Wellness Center**

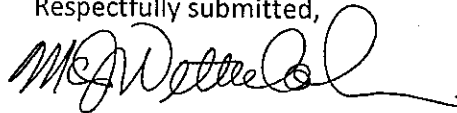
On October 23, 2012, an *ad hoc* group of residents of the communities surrounding the Potomac Valley Nursing and Wellness Center (hereinafter "Nursing Home" or "Applicant") filed a petition for leave to intervene before the City of Rockville Board of Appeals (hereinafter "Board") in opposition to the issuance of an amendment to a special exception which would permit the construction and operation of an addition to the Nursing Home in close proximity to homes located on Don Mills Court, with significant impact on such homes, on the residences along the entire length of Potomac Valley Road and the many residents of the Markwood and New Mark Commons communities and even the residents of the Nursing Home, itself (collectively the "Communities"). Subsequently, before being heard by the Board at its scheduled November 2012 meeting, Applicant indicated it was modifying its plan which it hoped to have reviewed by the Board in February 2012.

The petitioning Communities move that, as a panel, the members of the Board conduct a site visit accompanied by representatives of each of the parties prior to its February 2013 meeting

or prior to such time it considers the amended application.. Such site visit is necessary to appreciate the existing site conditions, and potential impacts of the proposal. Major portion of the Nursing Home affected by the proposal are not visible from the street. Photographs are not an adequate substitute and would not permit entry onto private property to determine the true impact of the proposal. The Reisses who live at 9 Don Mills Court and who are arguably the most significantly impacted have agreed to permit this visit. Such a site visit is in accord with the Maryland Rules of Civil Procedure for its Circuit Courts. Rule 2-515, "View," permits the court, on motion of any party or on its own initiative, to order that "the trier of fact [here the Board] view any property that is involved in the litigation...."

Petitioners assert that such site visit accompanied by the parties is necessary if the Board is to fulfill its mandate and so move.

Respectfully submitted,

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Mark J. Wetterhahn

Agent for Petitioners



**BEFORE THE ROCKVILLE BOARD OF APPEALS**

**IN RE:       SPECIAL EXCEPTION APPLICATION SPX2012-000385  
              AMENDMENT TO SPX 1996-00245 / S-50-61  
              POTOMAC VALLEY NURSING FACILITIES, INC., APPLICANT  
              1235 Potomac Valley Road, Rockville**

**APPLICANT'S REPLY TO PETITIONERS'  
MOTION TO VIEW PROPERTIES**

Applicant, Potomac Valley Nursing Facilities, Inc., hereby replies as follows to the Motion of Petitioners to have the Board of Appeals view properties other than the Subject Property related to the proposed amendment of the special exception of the Potomac Valley Nursing and Wellness Center:

1.       The Board of Appeals Rules of Procedure contain no provisions regarding requests to view properties and no procedures for conducting a pre-special exception hearing view.
2.       The sole rule cited by Petitioners in their Motion to View is Maryland Rules of Procedure, Rule 2-515. This Rule applies to property views of matters before the Circuit Court, not the City of Rockville Board of Appeals.
3.       Moreover, the cited Circuit Court Rule states, "The judge shall be present at and shall supervise the view and shall be the only person permitted to make any statement to the jury during the view." Further, the Rule expressly provides, "The court...may order that the trier of fact view any property involved in the litigation." (Emphasis added)
4.       The special exception case before the Board of Appeals does not involve a judge or jury. In essence, every member of the Board serves as both judge and juror. Thus, were Rule 2-515 to be followed, any Board member could make any comment he/she wished to any other

Board member(s) during the view. This could lead to unintended ex parte, Open Meetings Act, and/or due process violations.

5. Clearly, Rule 2-515 was never intended to, nor should this Board allow it to, be applied to the Board's conduct of a special exception case.

6. Moreover, the Open Meetings Act Manual prepared by the Office of the Maryland Attorney General (7<sup>th</sup> ed., Oct. 2010) expressly notes at page 2-15 that "Under Sec. 10-503(b) [of the State Government Article] the [Open Meetings] Act applies to a public body when it is meeting to consider... '(2) a special exception...'" Petitioners' requested view would clearly be part of the special exception case. Further, the Manual states at page 2-8, "A public body cannot void its obligations under the [Open Meetings] Act by labeling its meeting a 'work session' or 'pre-meeting,' or by gathering together at some location other than the customary meeting room." (emphasis added). Additionally, the Act applies to meetings of a quorum of the public body (Manual at p. 2-6; Act at Sec. 10-502(g)) which, as applied to the Board of Appeals, consists of two members.

Thus, in addition to having to be held in public session, all components of the special exception proceeding, including Petitioners requested view, must be accorded the full complement of procedural due process requirements of the Open Meetings Act including, among others, complete and timely public notice.

7. Finally, the Land Use Article of the Ann. Code MD. provides the land use enabling authority for the City. Nowhere does the Land Use Article expressly authorize the view requested by Petitioners. However, at Sec. 4-304(c)(1)(i), the Land Use Article does mandate that the Board of Appeals "shall make a recording of all proceedings..." Again, among other procedural requirements, a view conducted by the Board would have to be recorded in full.



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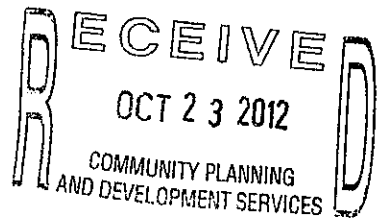
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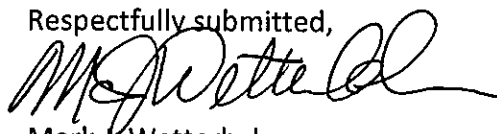
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Respectfully submitted,

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Mark J. Wetterhahn  
Agent for Petitioners

BEFORE THE ROCKVILLE BOARD OF APPEALS

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AMENDMENT TO SPX 1996-00245 SNF S-50-61

POTOMAC VALLEY NURSING FACILITIES INC., Applicant

1235 Potomac Valley Road, Rockville, Maryland

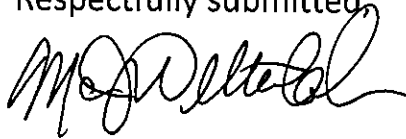
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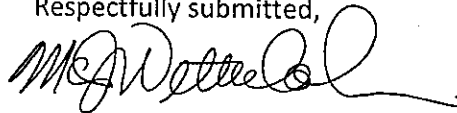
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Mark J. Wetterhahn

Agent for Petitioners

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2.       The sole rule cited by Petitioners in their Motion to View is Maryland Rules of Procedure, Rule 2-515. This Rule applies to property views of matters before the Circuit Court, not the City of Rockville Board of Appeals.
3.       Moreover, the cited Circuit Court Rule states, "The judge shall be present at and shall supervise the view and shall be the only person permitted to make any statement to the jury during the view." Further, the Rule expressly provides, "The court...may order that the trier of fact view any property involved in the litigation." (Emphasis added)
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Board member(s) during the view. This could lead to unintended ex parte, Open Meetings Act, and/or due process violations.

5. Clearly, Rule 2-515 was never intended to, nor should this Board allow it to, be applied to the Board's conduct of a special exception case.

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Thus, in addition to having to be held in public session, all components of the special exception proceeding, including Petitioners requested view, must be accorded the full complement of procedural due process requirements of the Open Meetings Act including, among others, complete and timely public notice.

7. Finally, the Land Use Article of the Ann. Code MD. provides the land use enabling authority for the City. Nowhere does the Land Use Article expressly authorize the view requested by Petitioners. However, at Sec. 4-304(c)(1)(i), the Land Use Article does mandate that the Board of Appeals "shall make a recording of all proceedings..." Again, among other procedural requirements, a view conducted by the Board would have to be recorded in full.

8. Assuming that the Board determines that the view can be conducted in full compliance with all state and local laws, regulations, procedures and rules governing the Board itself, its open meeting requirements and the special exception, and the Board decides to conduct a view as requested, the Applicant requests that, at a minimum, the following pre-view determinations be made and procedures established for application during the view:

a. In advance of the view:

- i. Determine which property or properties shall be viewed, for what specific purposes, and obtain written consent from the owners of the properties to be entered;
- ii. Counsel for the Applicant, Agent for Petitioners, and the Board's Counsel shall be invited to attend the view along with the Board;
- iii. No other persons or entities shall be invited or allowed to participate in the view; and
- iv. Attendance or participation at the view shall not, in and of itself, make a person or entity a party of record in the special exception case.

b. During the view:

- i. All members of the Board must attend the entire view;
- ii. All proceedings of the view must be recorded pursuant to Land Use Art., Sec. 4-304(c)(1)(i);
- iii. All view attendees must be fully advised of all rules and procedures to be followed;
- iv. All attendees must stay together during the entirety of the view;
- v. Only members of the Board may make comments during the view, and all such comments shall be made in their entirety to all attendees and on the record;

vi. No questions may be asked of or responses provided by or on behalf of any party or their representative, (the appropriate forum for such questions, answers, rebuttal and cross examination being at the special exception hearing);

vii. No photos, films, drawings or depictions of any kind may be taken or made during the view;

viii. No communications of any kind may be made by any non-invitee during the view including, but not limited to, verbal, written, signage or pictorial displays. Staff must pre-visit the site(s) to ensure that no signage or pictorial displays have been provided; and

ix. The entire view must be completed during a single visit.

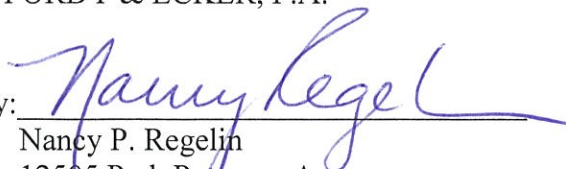
9. Because Petitioners have requested the view, Petitioners shall be responsible for paying in their entirety any and all fees, costs, expenses and reimbursements associated with the view.

10. No individual member of the Board shall be precluded from conducting his own view of the special exception property as may be customary.

11. Should the Board determine that the view cannot be conducted in full compliance with all state and local laws, regulations, procedures and rules governing the Board itself, its open meeting requirements and the special exception, then Applicant must respectfully request that the Board deny Petitioners' Motion to View to avoid interference with or denial of due process rights of the parties, violation of ex parte requirements, and/or prejudice to the Applicant, Petitioners or any other party.

Respectfully submitted,

SHULMAN, ROGERS, GANDAL,  
PORDY & ECKER, P.A.

By: 

Nancy P. Regelin  
12505 Park Potomac Avenue  
Sixth Floor  
Potomac, Maryland 20854  
(301) 230-5224

*Attorney for Applicant, Potomac Valley  
Nursing Facilities, Inc.*

cc: Mark J. Wetterhan, Agent for Petitioners, by mail and e-mail  
Debra Daniel, Esquire, City Attorney  
Mr. Cas Chasten, City Planner

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**Petitioner's Comments on Applicant's Reply to Motion to View Properties**

On February 6, 2013, counsel for the Potomac Valley Nursing and Wellness Center (hereinafter "Nursing Home" or "Applicant") in the captioned matter filed a reply to Petitioner's motion to view the property for which the special exception is sought and certain of the properties most affected by the requested action. Petitioner wishes to comment on the salient points raised by Applicant. It is Petitioner's position that points raised by Applicant reinforce that the view of the properties suggested by Petitioners is necessary in the context of this application and that the requested action can be accommodated within the rules of the Board of Appeals and any constraints placed upon it.

On October 23, 2012, an *ad hoc* group of residents of the communities surrounding the Nursing Home) filed a petition for leave to intervene before the City of Rockville Board of Appeals (hereinafter "Board") in opposition to the issuance of an amendment to a special exception which would permit the construction and operation of an addition to the Nursing Home in close proximity to homes located on Don Mills Court, with significant impact on such homes, on the residences along the entire length of Potomac Valley Road and the many



residents of the Markwood and New Mark Commons communities and even the residents of the Nursing Home, itself (collectively the "Communities"). Subsequently, before being heard by the Board at its scheduled November 2012 meeting, Applicant indicated it was significantly downsizing and modifying its plan which it hoped to have reviewed by the Board sometime in March 2013. Nevertheless, Petitioner submits that impacts of the project on the surrounding residences remain.

Applicant states that the rule cited by Petitioner in support of its motion only applies to property views concerning matters before the Circuit Court of Maryland. However, the administrative procedures under which this Board acts are meant to be flexible and permit the greatest informality and inclusiveness in permitting citizens to participate in the administrative process and to thereby develop a complete record on which a decision can be based. These rules should be applied and interpreted in the manner that least restricts the rights of citizens of Rockville to participate in the process and thereby protect their interests. Importantly, Applicant points to no prohibition in the rules against the view.<sup>1</sup> Petitioner believes, as discussed below, that the view requested by Petitioner can be accommodated within the purview of the applicable requirements governing this Board's actions.

The points raised by Applicant reinforce the need for the view in the manner suggested by Petitioner. For example, without such a view, each of the Appeal Board members would be constrained to view the premises individually.<sup>2</sup> It is the undersigned's understanding that members of the Board only would view the properties from public right-of-ways. The area at

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<sup>1</sup> Implicit in Applicant's pleading is an admission that under appropriate conditions the request is permissible.

<sup>2</sup> Individual Board members are of course free to view the site independently in addition to this view, but this would appear to be unnecessary.

issue at the Nursing Home is not visible from public rights-of-way. The potential for impact on the surrounding properties is best viewed from the affected properties themselves, *e.g.*, decks and balconies. If not permitted to view the areas as a panel, each Board member would likely have a different viewing perspective, resulting in inconsistent factual bases and impressions, thus making any decision more subjective. The collective decision of the Board would not be based on findings of fact and conclusions of law garnered from the best evidence developed as a result of actions of a unified board.

Applicant argues that the Board must make a recording of all proceedings during the view. Petitioner believes that in the circumstances, a formal contemporaneous recording is not necessary and legal requirements can be accommodated by the procedures and processes discussed herein<sup>3</sup>. As proposed by Applicant, counsel for the Applicant, Agent for Petitioner, and the Board's counsel would be invited to attend the view (but in Petitioner's view, the absence of any representative of any party or one of the Board members would not prevent or impact the view).<sup>4</sup> Petitioner agrees that the Board must stay reasonably together and the representatives of the parties be allowed in the proximity of the Board. No substantive interchanges would be permitted and any questions by the Board (except for the most general, *e.g.*, what is that?) would be taken down in writing by a member of the Board or its representative. To the extent that others may wish to accompany the Board, they may, at the discretion of the Board (and to the extent on private property, the owners of that property) and in accordance with any rules announced by the Board.

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<sup>3</sup> Should a real-time recording be necessary, the audio visual capabilities of the City could be used to fulfill that requirement.

<sup>4</sup> Petitioner believes that separate counsel for the City Staff should also attend.

Subsequent to the conclusion of the view (which is probably most conveniently done before the hearing)<sup>5</sup>, at the beginning of the hearing, it would be expected that the Board would describe its view on the record and describe generally what was seen. The parties would be given an opportunity to comment on or correct any statement on the record. Any questions posed by the Board would be read into the record to be responded to by counsel or witnesses, as appropriate.<sup>6</sup>

The notion advanced by Applicant that Petitioners should pay all costs associated with the view is contrary to policy of the City of Rockville and its implementation of that policy regarding the participation, inclusiveness and openness in dealing with its citizens. All portions of the proceeding should be treated equally. Should engaged citizens be made to pay for the cost of electricity and heat in the hearing room because they question a project advanced by a for profit entity in accordance with their rights? Clearly the answer to such question is no. Any expense should be borne by the City or by the Applicant because this view will lead to the development of a more complete record on the application filed by Applicant.

Applicant would bar "verbal written, signage or pictorial displays" during the view and would have the City Staff pre-visit the site to enforce this edict.<sup>7</sup> This requirement is ludicrous on a number of levels. First, the First Amendment to the United States Constitution (U.S. Const.

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<sup>5</sup> Petitioners would contemplate that the notice of the view would be given with the same formality as the notice of hearing in this matter and coincident with it.

<sup>6</sup> The described procedure fulfills the requirement that the Board of Appeals "shall make a recording of all proceedings...." The quoted language does not require a contemporaneous recording. Petitioner submits that the outlined procedure results in a recorded proceeding as required by the Land Use Article.

<sup>7</sup> It is not clear on what basis Applicant determined such "protests" to be other than a theoretical possibility

amend. I) expressly permits the activities sought to be prohibited (and which prohibition Applicant seeks to be enforced by the government). Surely, Applicant would not suggest that citizens could not peacefully picket City Hall during the hearing or even engage in some forms of peaceful protest, *e.g.*, wearing lettered tee shirts, in the hearing room. Second, Applicant denigrates the knowledge and professionalism of the appointed members of the Board. Surely, Applicant is not suggesting that such experienced individuals do not know or would not follow the requirement that their decision be based on the record they develop and not on some random sign seen during a site visit.

With regard to the requested prohibition on the taking of photos during the view, there is no basis for this. Such photo, drawing or depiction is clearly not part of the evidentiary record unless properly introduced at the hearing itself. Applicant does not assert any harm in the mere taking of a photo or rendering of a drawing by any member of the group.<sup>8</sup>

Petitioner's counsel has checked with the owners of Nos. 7-9 Don Mills Court and each has stated no objection to the Board and representatives of the parties entering onto their property for the purposes of a view.<sup>9</sup> If permission is needed in writing, they are prepared to execute any such permission which is drawn up by the City or Applicant. Petitioner's representative is willing to work on reaching agreement with the Applicant and City as to any necessary conditions to assure the success of the view should the Board so desire it.

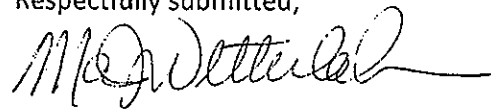
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<sup>8</sup> Owners of property abutting the Nursing home have previously permitted representatives of Applicant to take photographs from their property.

<sup>9</sup> Such view, as proposed by Petitioner, would include these properties as well as those exterior portions of the Nursing Home affected by the proposed special exception request.

Petitioners reiterate the need for the requested view to assure a complete record in this matter and assert that such view can be reasonably accomplished within the constraints imposed by law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark J. Wetterhahn', with a long horizontal flourish extending to the right.

Mark J. Wetterhahn

Agent for Petitioners

**BEFORE THE ROCKVILLE BOARD OF APPEALS**

**IN RE: SPECIAL EXCEPTION APPLICATION SPX2012-000385  
AMENDMENT TO SPX 1996-00245 / S-50-61  
POTOMAC VALLEY NURSING FACILITIES, INC., APPLICANT  
1235 Potomac Valley Road, Rockville**

**APPLICANT'S AMENDED MEMORANDUM**

**ADDRESSING PETITIONERS'**

**MOTION TO VIEW PROPERTIES**

Dated: March 12, 2013

Applicant, Potomac Valley Nursing Facilities, Inc., amends its earlier submittal in light of the recent Court of Appeals decision, *WSG Holdings, LLC v. Bowie*, 429 Md. 598, 57 A.2d 463 (2012). To the extent that the Applicant's earlier brief is contrary to the Court's decision, the Applicant withdraws such language. The Applicant advises that if, notwithstanding a full hearing conducted in Rockville City Hall, the Rockville Board of Appeals (the "Board") were to determine that it is impossible to render a decision without viewing the Nursing Home from the Reisses' back yard at 9 Don Mills Court, then the Board must strictly follow its Rules of Procedure just as it would for any other public meeting.

- 1) By way of background, the Potomac Valley Nursing Home has been operating since the 1960's. The Board will be considering the Applicant's amended special exception application. The amended application eliminated the original proposed expansion of the building itself. The Board will be considering essentially what remains of the application. Among the modifications are the following: (1) an increase from 70 to 100 employees; (2) expanded paving for more parking;

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1235 Potomac Valley Road, Rockville

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Dated: March 12, 2013

(3) modifications to the forest conservation areas and landscaping; (4) a replacement entrance sign; (5) a new emergency generator located in the same location as the existing one; (6) one-story, backyard-type storage sheds in the rear, and within the existing board on board fenced enclosure; (7) striping and other sidewalk improvements; (8) confirmation of two existing, ground level, decks, located near the front door, and one on the lower ground level along the front facade; (9) confirmation of the existing lower ground level gazebo along the front facade; and (10) in ground upgrades and some clearing to meet Maryland Environmental Site Design stormwater management requirements.

- 2) The factual circumstances of the Court of Appeals' case are similar to the ones that underlie the Petitioner's requested site visit. Based on the facts in the Charles County case, the Court found that the Charles County Board of Appeals site visit warranted, "requiring strict adherence to public meetings provisions through providing notice to the public and keeping a record of the meetings, among other measures." *WSG Holdings*, 429 Md. at \_\_\_, 57 A.2d at 476.

Further, the Court found as follows:

The public meetings mandates that apply in the present  
case emanate from Section 4.07 of Article 66B [now

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Md. Code Ann. Zoning, Sections 1-206; and 4-301-4-306.],  
requiring that Charles County, among others, establish a  
Board of Appeals to review applications for special  
exceptions and adopt rules and regulations governing the  
Board's procedures. Section 4.07(c)(4) further mandates that  
"[a]ll meetings of a board of appeals shall be open to the  
public," [now, Md. Code Ann. Zoning, Section 4-303(a)(3).],  
and Section 4.07(c)(5) [now Md. Code Ann. Zoning,  
Section 4-304] requires that the board "shall make a transcript  
of all proceedings" which "shall be a public record."

*WSG Holdings*, 429 Md. at \_\_\_, 57 A.2d at 476-477.

- 3) Accordingly, at the April 13, 2013 hearing and after a full hearing conducted in the Rockville City Hall hearing room, should the Board find that it is impossible to render a decision, without viewing the rear of the existing building and the other improvements from the Reisses' back yard at 9 Don Mills Court, the Board must then duly establish and conduct a separate public meeting and, in doing so, strictly follow its Rules of Procedure, which "emanate" from:



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- a) Md. State Government Code Ann. Section 10-501, *et seq.* concerning open meetings;
  - b) Md. Ann. Code Zoning, Sections 1-206; and 4-301, *et seq.*, explained by the Court of Appeals in the above quotations.
  - c) Rockville Zoning Ordinance, including, Section 25.04.03e.
  - d) Rockville Board of Appeals Rules of Procedure, including Section VI, Hearings and Meetings.
- 4) The Court described the prohibited practices that occurred in the course of the site visit of the *WSG Holdings* case, where the rules were not strictly followed. The following excerpts illustrate the inherent difficulties in conducting such a site visit.
- a) "The Board allowed representatives from WSG as well as two citizens to attend, but it prohibited any other members of the public from attending and kept no transcript or other record of that which transpired." *WSG Holdings*, 429 Md. at \_\_\_, 57 A.2d at 466-467.
  - b) "An adjoining property owner, Charles E. Parmley, attempted to join the group gathered at the site, but was denied access. No record was kept of the . . . visit to the property, and contentions abound as to what transpired. Respondents

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contend that WSG made a presentation before the Board regarding the location and impact of the planned development, that Board members questioned WSG representatives about matters outside the scope of the mere layout of the site, and that WSG submitted to the Board a document regarding prior [Charles] County approval for use of the property as an airport. Respondents further contended that the trip was fragmented and that the Board separated into different groups on various portions of the property, with each group hearing presentations from WSG at different times." *WSG Holdings*, 429 Md. at \_\_\_\_, 57 A.2d at 471-472.

- 5) Nonetheless, even ignoring the drawbacks of conducting such a site visit, and ignoring the extraordinary cost *versus* the benefit to be derived, a site visit is not prohibited. It must be conducted strictly in accordance with the Board of Appeals Rules of Procedure that govern all of the Board's public meetings.
- 6) The requested site visit is unnecessary. The Board regularly conducts public meetings for special exceptions at Rockville City Hall. The Board regularly considers a variety of plans, pictures, illustrations and other evidence intended to inform the Board of the facts and circumstances, without forcing the Board to

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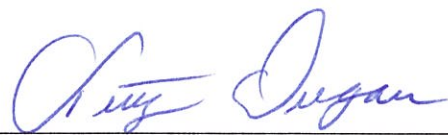
conduct a public meeting at the Potomac Valley Nursing Home site, much less in the Reisses' back yard.

- 7) The question for the Board is whether, notwithstanding a full hearing, to be conducted on April 13, 2013, in the Rockville City Hall hearing room, it is impossible to render a decision about the requested modifications without viewing the Nursing Home from the Reisses' back yard at 9 Don Mills Court. If the Board were to make such a decision, the required open meeting must strictly follow the same statutory requirements as those applicable to a hearing held in City Hall.

Respectfully submitted,

SHULMAN, ROGERS, GANDAL,  
PORDY & ECKER, P.A.

By: \_\_\_\_\_



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Potomac Valley  
Nursing Facilities, Inc.

BEFORE THE ROCKVILLE BOARD OF APPEALS  
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1235 Potomac Valley Road, Rockville

APPLICANT'S AMENDED MEMORANDUM  
ADDRESSING PETITIONERS'  
MOTION TO VIEW PROPERTIES  
Dated: March 12, 2013

cc (by regular mail and e-mail):

Mark J. Wetterhan, Esquire, Agent for Petitioners,  
Debra Daniel, Esquire, City Attorney  
Cynthia Walters, Esquire, Assistant City Attorney  
Mr. Cas Chasten, City Planner

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**BEFORE THE ROCKVILLE BOARD OF APPEALS**

**IN RE: SPECIAL EXCEPTION APPLICATION SPX2012-000385**

**AMENDMENT TO SPX 1996-00245 SNF S-50-61**

**POTOMAC VALLEY NURSING FACILITIES, INC., Applicant**

**1235 Potomac Valley Road, Rockville**

**Petitioners' Reply to Applicant's Amended Memorandum  
Addressing Petitioners' Motion to View Properties**

On March 12, 2013, counsel for the Potomac Valley Nursing and Wellness Center (hereinafter "Nursing Home" or "Applicant") in the captioned matter filed "Applicant's Amended Memorandum Addressing Petitioners' Motion to View Properties." Petitioners wish to briefly reply to a few points raised by Applicant. Initially, it is entirely unclear what portions of Applicant's prior memorandum are being withdrawn and which parts are still viable.<sup>1</sup> The Board should not be required to consider such an amorphous pleading.

In any event, it is Petitioners' position that the case now proffered by Applicant, *WSG Holdings, LLC V. Bowies*, 429 Md. 598, 57 A.2d 463, 2012 Md Lexis 838 (2012), can act as a road map in establishing ground rules for the site visit which will pass judicial muster.<sup>2</sup> The procedures originally proposed by Applicant, together with the comments of Petitioners, can form an acceptable set of procedures for the site visit. As previously discussed in its pleadings,

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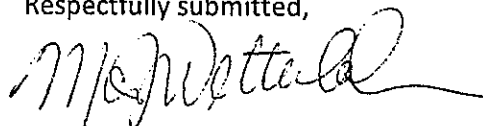
<sup>1</sup> It is not clear why a case decided over a month before Applicant's reply escaped the notice of counsel whose web page states that "[o]ur unique team of professionals delivers sound counsel and creative solutions to achieve your time-sensitive goals by drawing upon decades of experience involving our numerous zoning and land use cases, state and local lobbying, and active community and industry involvement."

<sup>2</sup> Petitioners are willing to work with Applicant's counsel and an appropriate City of Rockville representative to draft rules for the Board's consideration.

only a site visit can properly inform the Board of Petitioners' unique circumstances and perspectives and the impacts of the grant of the Special Exception amendment.

Finally, Applicant would seemingly attempt to minimize the scope of the remaining items under its Special Exception Amendment request. Petitioners believe the impact of certain remaining elements of Applicant's proposal would be substantial. Applicant characterizes a number of the elements of its application as "confirmation" of existing structures at its site. These existing elements are in actuality a result of Applicant's prior lack of adherence to the City of Rockville requirements related to Special Exceptions, i.e., the requirements for appropriate amendments to the originally-granted Special Exception.<sup>3</sup> As will be developed further at the hearing, the Board of Appeals may not consider the fact that these structures (and other structures to be identified) are already constructed inasmuch as Applicant failed to obtain the necessary prior approvals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. J. Wetterhahn', written over a horizontal line.

Mark J. Wetterhahn

Agent for Petitioners

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<sup>3</sup> Other requirements are related to Applicant's failure to request required City of Rockville approvals prior to adding paved parking spaces to its premises.

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1235 Potomac Valley Road, Rockville**

**APPLICANT'S SECOND AMENDED MEMORANDUM**

**ADDRESSING PETITIONERS'**

**MOTION TO VIEW PROPERTIES**

Dated: March 14, 2013

Applicant, Potomac Valley Nursing Facilities, Inc., sends this "Second Amendment" to its earlier submittals in light of the recent Court of Appeals decision, *WSG Holdings, LLC v. Bowie*, 429 Md. 598, 57 A.2d 463 (2012). Notwithstanding any of the Applicant's earlier pleadings to the contrary as to the Petitioners' Motion, the Applicant advises that if, notwithstanding a full hearing conducted in Rockville City Hall, the Rockville Board of Appeals (the "Board") were to determine that it is impossible to render a decision without viewing the Nursing Home from the Reisses' back yard at 9 Don Mills Court, then the Board must strictly follow its Rules of Procedure, just as it would for any other public meeting. Stated another way, no one, including the Applicant and any interested party, has any right or authority to prescribe different procedures for the Board of Appeals to follow.

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1235 Potomac Valley Road, Rockville

APPLICANT'S SECOND AMENDED MEMORANDUM  
ADDRESSING PETITIONERS'  
MOTION TO VIEW PROPERTIES  
Dated: March 14, 2013

Respectfully submitted,

SHULMAN, ROGERS, GANDAL,  
PORTY & ECKER, P.A.

By: 

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Nancy P. Regelin; (301) 230-5224; nregelin@shulmanrogers.com  
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Potomac, Maryland 20854

Attorneys for Applicant,  
Potomac Valley  
Nursing Facilities, Inc.

cc (by regular mail and e-mail):

Mark J. Wetterhan, Esquire, Agent for Petitioners,  
Debra Daniel, Esquire, City Attorney  
Cynthia Walters, Esquire, Assistant City Attorney  
Mr. Cas Chasten, City Planner

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**BEFORE THE ROCKVILLE BOARD OF APPEALS**

**IN RE: SPECIAL EXCEPTION APPLICATION SPX2012-000385**

**AMENDMENT TO SPX 1996-00245 SNF S-50-61**

**POTOMAC VALLEY NURSING FACILITIES, INC., Applicant**

**1235 Potomac Valley Road, Rockville**

**Petitioners' Reply to Applicant's Second Amended Memorandum  
Addressing Petitioners' Motion to View Properties**

Citizen-participants in this proceeding will not be cowed by Applicant counsel's repeated filings which, in such participants' view, are designed to exhaust their resources and run roughshod over the administrative process. On March 14, 2013, counsel for the Potomac Valley Nursing and Wellness Center (hereinafter "Nursing Home" or "Applicant") in the captioned matter filed "Applicant's Second Amended Memorandum Addressing Petitioners' Motion to View Properties," the second similar filing in this matter in two days.

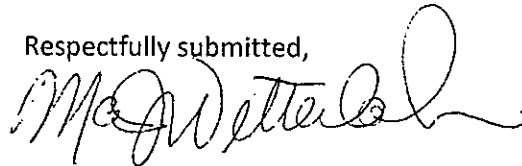
Applicant now frames the central issue as follows: a view of the Nursing Home and adjoining properties would only be permitted under the rules governing the Appeal Board if it "were to determine that it is impossible to render a decision without viewing the Nursing Home from the Reisses' back yard at 9 Don Mills Court....<sup>1</sup>" Applicant provides no basis for its "impossibility" test. In fact, this Board has wide discretion in determining what evidence to consider in reaching its decision. If evidence is reliable and probative, it may be considered by

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<sup>1</sup> Second Amended Memorandum at 1. Applicant also requested a view of portions of the facility itself and other adjoining properties.

this panel. Actually seeing the site and affected neighboring locations would seem to be of the utmost importance to developing a sound and complete record in this matter. Administrative proceedings are designed to be flexible and inclusive. Certainly, the Board must follow its Rules of Procedure in considering any matter before it; Petitioners submit that, as previously discussed, the requested view can be accomplished in accordance with all governing requirements and precedents.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark J. Wetterhahn', with a large, stylized loop at the end.

Mark J. Wetterhahn

Agent for Petitioners